IN THE SUPREME COURT OF IOWA

Supreme Court No. 15-1191

SPENCER JAMES LUDMAN,

Plaintiff-Appellee/Cross-Appellant,

v.

DAVENPORT ASSUMPTION HIGH SCHOOL,

Defendant-Appellant/Cross-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT FOR SCOTT COUNTY
THE HONORABLE NANCY S. TABOR

DEFENDANT-APPELLANT'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

The Iowa Supreme Court should retain this case because it presents fundamental issues of broad public importance requiring prompt and ultimate determination by the supreme court and substantial questions of enunciating legal principles, particularly concerning the duties of schools to protect participants from inherent risks of sports or activities in which they voluntarily participate. Iowa R. App. P. 6.1101(2)(d) and (f).

STATEMENT OF THE CASE

A. Nature of the Case

The present case is a premises liability matter that arises out of an accident in which the Plaintiff, Spencer Ludman, was struck by a foul ball while participating in a high school baseball game at Davenport Assumption High School's baseball field. Ludman was a member of Muscatine High School's baseball team during the summer following his senior year of high school. On July 7, 2011, Muscatine was playing a varsity baseball game against Davenport Assumption High School (hereafter "Assumption") at Assumption's baseball field. While Muscatine was at bat in the fifth inning, Ludman anticipated the Muscatine batter was about to make the third out so he grabbed his hat and glove in preparation to take the field to play defense. The Assumption dugout had a 25.5-foot-long protective fence in front of it,

but Ludman positioned himself in one of the dugout's openings, which were for entrance and exit between the dugout and field of play, instead of behind the fence. While Ludman was standing on the periphery of the fence he was not watching the batter, and when the batter hit a foul ball towards the dugout Ludman shifted his head to look for the ball. Ludman did not see the ball until it was too late and was hit in the head by the foul ball and injured.

Ludman brought suit against Assumption, contending Assumption was negligent in design and construction of the visitor's dugout. At trial, Ludman's key contention was that Assumption should have had gates on the dugout openings or should have installed an L-shaped fence in front of the openings to keep foul balls from reaching the dugout.

On appeal, the issues are as follows:

(1) Assumption was entitled to directed verdict on the duty element of Ludman's negligence claim based on application of the limited duty rule (also known as primary assumption of the risk) and legal authorities concerning open and obvious hazards. In short, Assumption did not have a duty to protect Ludman from the inherent risks or open and obvious dangers of the sport in which Ludman was voluntarily participating.

(2) Ludman's evidence at trial was insufficient to create a jury question, regardless of the limited duty rule, and Assumption was entitled to

directed verdict in its favor. There was insufficient evidence to show that Assumption created an unreasonable risk of injury or that Assumption knew Ludman would not recognize the obvious danger of standing in an unprotected location and would fail to protect himself upon voluntarily positioning himself in such a location.

(3) The district court erred in barring Assumption from presenting key evidence concerning the custom and standard practice in the design and construction of dugouts at schools throughout the Mississippi Athletic Conference, in which both Assumption and Muscatine High School were members. Legal authorities are clear that evidence of custom and standard practice is admissible in negligence cases. The district court committed highly prejudicial error by precluding Assumption from presenting competent and relevant evidence regarding customary design and construction of other baseball dugouts.

(4) The district court erred in failing to give jury instructions requested by Assumption concerning "proper lookout." The facts and law supported giving the jury instructions and failure to do so was prejudicial to Assumption.

Thus, on appeal, Assumption requests entry of judgment in its favor as a matter of law or, in the alternative, reversal and remand for a new trial.

B. Relevant Events of the Prior Proceedings

On April 5, 2013, Ludman filed his Petition at Law against Assumption, the Diocese of Davenport, and Muscatine Community School District. On May 8, 2013, Assumption filed its Answer. Muscatine Community School District and the Diocese of Davenport were dismissed without prejudice before trial. Prior to trial the district court denied Assumption's Motions for Summary Judgment. On June 5, 2015, Motions in Limine were argued and submitted. On June 18, 2015, the district court issued its Ruling on Motions in Limine. From June 22 to 29, 2015, the case was tried to a jury. On June 30, 2015, the jury returned its verdict and the district court entered Judgment in favor of Ludman. On July 13, 2015, Assumption filed its Notice of Appeal and Ludman filed a Notice of Cross-Appeal.

C. Disposition of the Case in the District Court

Following trial, the jury returned a verdict finding Assumption was negligent and Ludman's total damages were $1,500,000. Ludman was assessed 30% comparative fault. After amending the verdict to be consistent with the evidence concerning the award of past medical expenses and applying comparative fault, the district court entered Judgment in favor of Ludman and against Assumption for $1,033,216.68.

STATEMENT OF FACTS

On July 7, 2011, Plaintiff Spencer Ludman was playing baseball for Muscatine High School in a game against Davenport Assumption High School (hereafter "Assumption") at Assumption's baseball field when he was struck by a foul ball. (App. 215, 255; Tr. 295:6-15, 335:25-336:6). At the time, Ludman was eighteen-years-old and had already graduated from high school but was playing out his senior year as a member of the Muscatine High School baseball team. (App. 270-72, 289; Tr. 534:6-13, 541:304, Tr. 612:3-7).

Ludman was the starting second basemen and number two hitter in the lineup for Muscatine in the game against Assumption. (App. 274; Tr. 551:24-552:6). With Muscatine batting in the top of the fifth inning there were two outs and the number nine batter was at the plate and had two strikes on him. (App. 275, 549-52; Tr. 553:15-554:11). At this point, Ludman was in the hole, meaning he was due up two batters after the current batter. (App. 275; Tr. 553:15-554:11). Because of Ludman's belief that the number nine batter for Muscatine was not a very good hitter, Ludman did not think there was any way he was going to safely reach base to extend the inning; thus, Ludman grabbed his hat and glove. (App. 275; Tr. 553:15-554:11). After grabbing his hat and glove, Ludman positioned himself in the

second opening of the dugout (the one furthest from home plate) to the field of play in preparation to take the field to play defense. (App. 275; Tr. 553:15-554:11). Ludman testified he had his right foot up on the dugout step and his left foot on the dugout floor. (App. 275; Tr. 553:15-555:5).

On July 7, 2011, the visiting team's dugout at Assumption was on the first base side of the field, as is customary in baseball. (App. 225, 403-35; Tr. 336:19-337:6). The visitor's dugout was thirty-five-feet-and-five-inches long, seven feet wide/deep, and two steps below grade. (App. 237, 403-35; Tr. 383:11-16). There was a protective fence in front of the majority of the visitor's dugout, which ran for 25.5 feet in length and extended from the ground to the ceiling of the dugout. (App. 237-38, 403-35; Tr. 384:18-385:12). At each end of the visitor's dugout there was a five-foot-wide opening in the fence to allow players entrance and egress between the field and the dugout. (App. 237-38, 403-34; Tr. 384:18-385:12). There was a bench in the visitor's dugout, which was positioned behind the protective fence and had two levels on which the players could sit. (App. 229, 233, 403-35; Tr. 351:23-352:13, 368:9-17). An assistant coach for Muscatine testified it was commonplace for the players to sit on both the upper and lower levels of the bench. (App. 229, 233; Tr. 351:23-352:13, 368:9-17).

Muscatine had fifteen players and four coaches on their team. (App. 215; Tr. 293:3-10). Thus, when Muscatine was batting and nobody was on base, there would be only fifteen total people in the dugout—with one player batting, one player on deck, and two coaches on the field. (App. 215; Tr. 293:16-294:6). Ludman did not put on evidence that there was no room to sit on the bench just prior to the accident or that he could not have stood in front of the bench. (App. 229, 233, 275, 346-47; Tr. 351:23-352:13, 368:9-17, 553:15-555:15, 892:25-893:1). Ludman also did not put on evidence of the actual, measured distance from home plate to either of the visitor's dugout openings, but an assistant coach for Muscatine estimated the second opening of the visitor's dugout—where Ludman was standing—was "maybe 65 feet" from home plate. (App. 216; Tr. 300:11-13).

After grabbing his hat and glove and taking a position in the second opening of the dugout—furthest from home plate—Ludman testified he was looking at the pitcher before the pitch was thrown, but he did not follow the pitch to the batter because he was positioning his foot on the dugout step. (App. 275-76; Tr. 556:9-558:4). In particular, Ludman testified:

> The first place I looked would have been to the east, so to the left of the screen towards the field of play. Because of the sound, I just wanted to see where the ball went, so I immediately shifted my head slightly to see where the ball had gone.
>
> ***

> I saw the pitch being thrown, and the way I was positioned coming back towards facing the field, so putting my foot on the step and everything, I saw the pitch being thrown, and the next thing I saw was the ball.

(App. 275-76; Tr. 556:13-17, 557:9-13). The right-handed batter hit that pitch, but his swing was late and he hit a line drive toward the visitor's dugout. (App. 215, 230; Tr. 296:6-15, 356:14-22). Ludman testified that when he heard the batter hit the ball, he "shifted [his] head slightly to see where the ball had gone," but he did not see the ball until it was in his peripheral vision near his head. (App. 275; Tr. 556:13-17). The foul ball struck Ludman in the head about halfway up his skull behind his left ear. (App. 277; Tr. 561:9-17).

After being struck Ludman fell to the ground and his coaches and parents quickly attended to him. (App. 276-77; Tr. 558:5-24). Ludman had trouble communicating immediately thereafter. (App. 276-77; Tr. 558:5-564:15). An ambulance transported Ludman to the local hospital, and after initial treatment he was airlifted to the University of Iowa Hospitals and Clinics (UIHC) in Iowa City. (App. 276-77; Tr. 559:17-563:21). Ludman was diagnosed with a skull fracture and brain hemorrhage. (App. 277-78; Tr. 564:24-565:12). Ludman was treated with dehydration therapy—his injuries did not require surgery—and was discharged after twelve days at UIHC. (App. 278-79; Tr. 565:15-569:15). After being discharged Ludman

received speech therapy, motor skills therapy, and treatment for depression and anxiety. (App. 279-80, 282; Tr. 569:16-573:15, 583:24-585:23).

In the fall of 2011, Ludman attended Muscatine Community College—the same school he planned to attend prior to his injuries. (App. 280; Tr. 574:2-575:24). After one semester, Ludman took a break from school and worked on a hog farm until March 2012. (App. 280-81; Tr. 575:25-579:8). On March 11, 2012, Ludman apparently had a seizure while working at the hog farm. (App. 281-82; Tr. 579:7-581:18). On March 22, 2012, Ludman had a second seizure. (App. 281-82; Tr. 580:24-581:18). After the second seizure Ludman was prescribed an anti-seizure medication and has had no more seizures. (App. 281-82, 286; Tr. 579:7-581:18, 599:14-15).

Ludman worked other jobs for a period of time before returning to school in the fall of 2013 at Muscatine Community College and graduating in 2014, with a better than 3.5 grade point average in his final semester. (App. 283, 292; Tr. 586:10-588:21; 623:9-17). In the fall of 2014, Ludman enrolled at Iowa State University and managed 2.67 grade point average in his first semester. (App. 283, 292; Tr. 588:22-24, 623:18-22). In the spring semester of 2015, Ludman transferred to the University of Iowa to pursue an English degree. (App. 284; Tr. 591:16-592:11). Ludman resumed playing

baseball in 2014 for a local semi-professional baseball team—the Muscatine Flames. (App. 286; Tr. 597:12-23).

Ludman was evaluated by neuropsychologist Dr. David Demarest from On with Life in June 2014, and this examination determined Ludman had fully recovered his cognitive function. (App. 293, 362, 370; Tr. 625:6-626:19). Dr. Demarest's deposition testimony was played for the jury via video, and he testified as follows:

> Q. And out of the cognitive testing that you performed on Spencer, all of his test scores fell at least within the average range or some even above or quite above?
> A. Yes, that's true.
>
> Q. And so Spencer didn't just do average compared to everybody. Spencer did what's average for Spencer?
> A. Yes, compared, for example to his baseline. I think he's probably back to where he was cognitively and with respect to his baseline pre-injury –
>
> Q. So he had a pretty good recovery cognitively?
> A. … He had a tremendous recovery cognitively.

(App. 306, 370). Ludman now has no work or physical restrictions. (App. 293; Tr. 627:6-629:6).

Prior to the baseball game at Assumption on July 7, 2011, Ludman had previously played baseball at Assumption's baseball field on two prior occasions. (App. 274, 291; Tr. 551:19-23; 620:12-19). Ludman was well aware of the configuration of the Assumption baseball field, including the

positioning of the dugout relative to the field of play and the openings at each end of the dugout. (App. 291-92; Tr. 620:22-622:11). In fact, when Ludman had previously played baseball games at Assumption, his coach warned players in the dugout to either keep immediately behind the dugout fence or sit on the dugout bench, which was positioned behind the protective fence. (App. 291-92; Tr. 621:17-622:11).

At trial, Ludman admitted there are risks inherent to playing baseball and that one of those risks was getting hit with a baseball, testifying as follows:

> Q. You had been playing baseball for 15 years when your accident happened?
> A. Yes, ma'am.
>
> Q. You admit there are risks in the sport of playing baseball?
> A. I admit that there is risk in the act of playing baseball. … Um, I believe that there are risks in the sport of baseball.
>
> Q. And one of those risks is that you can get hit with a ball?
> A. Yes.

(App. 289; Tr. 612:8-22). Ludman further admitted that he recognized the risk of baseballs entering into dugouts as one of the risks of playing baseball. (App. 289; Tr. 612:23-24).

A number of baseball coaches, who had substantial experience both playing and coaching, testified at trial that a well-recognized risk of the sport included being struck with a baseball. Assumption's high school head baseball coach, William Argo, who played professional baseball for a time and had over twenty years of college and high school coaching experience, testified at length regarding the well-known risk of being struck by foul balls. (App. 243, 255-56; Tr. 406:2-408:3, 463:7-465:7). In order to minimize this known risk to players, Coach Argo testified it is understood offensive players on or entering the field should wear helmets and players should generally stay out of the dugout openings. (App. 255; Tr. 463:11-24). Specifically, Coach Argo testified: "[I]f someone is coaching or playing baseball at the high school level, [] they know [foul balls going into the dugout is] a risk. That's something that could happen within the game." (App. 255; Tr. 464:9-17). Coach Argo's testimony further included the following exchange:

> Q. Coach, in the sport of baseball there is a risk that foul balls can go into a dugout?
> A. That's correct.

(App. 262; Tr. 491:16-18).

Muscatine's baseball coaches similarly testified that being struck by foul balls was a known risk associated with playing baseball. For example, Muscatine's head baseball coach Bob Leech testified as follows:

> Q. Now, you would agree that there are risks involved in the sport of baseball?
> A. Sure.
>
> Q. And one of those risks is that you can get hit with a ball?
> A. Yes.
>
> Q. And that balls -- foul balls can go into a dugout.
> A. Sure.

(App. 306; Tr. 678:3-11). Yet, Coach Leech had no rule against players standing in the second opening of the dugout (further away from home plate) because he believed it was unlikely a ball would strike a player at that location. (App. 306; Tr. 678:18-679:4). Muscatine assistant coach Shawn Ravenscraft also testified one of the risks of the sport is getting hit with a foul ball. (App. 233; Tr. 365:11-21).

Iowa high school baseball is regulated by the National Federation of High Schools (NFHS) and the Iowa High School Athletic Association. (App. 252; Tr. 452:17-22). Under this system the NFHS sets out rules, and the Iowa High School Athletic Association adopts and follows these rules; the 2011 NFHS Baseball Rules Book was applicable at the time of the incident involving Ludman and was admitted as a trial exhibit. (App. 252,

453-534; Tr. 452:17-453:6; 651:8-653:2). The NFHS rules do not include any rules regarding positioning, fencing, or screening of dugouts. (App. 253; 459-61; Tr. 454:13-455:3). The only mention of dugout placement by NFHS is a recommendation stating: "Recommended Distance from Foul Line to Nearest Obstruction or Dugout Should be 60'." (App. 459). Clearly this recommendation is intended to promote safety of the players on the field, rather than those in the dugout. (App. 344, 459; Tr. 866:15-21). And as Muscatine head coach Bob Leech testified, the diagrams noting dugout location are "simply suggestions … you do not necessarily follow those." (App. 300; Tr. 653:3-14). At no point do the NFHS rules address fencing around dugouts. (App. 453-534).

More important and applicable to the present case, the 2011 NFHS Baseball Rules Book recognizes the inherent risks associated with high school baseball. The 2011 NFHS Baseball Rules Book begins:

> To maintain the sound traditions of this sport, encourage sportsmanship and minimize **the inherent risk of injury**, the National Federation of State High School Associations writes playing rules for varsity competition among student-athletes of high school age. … Every individual using these rules is responsible for prudent judgment with respect to each contest, athlete, and facility, and **each athlete is responsible for exercising caution** and good sportsmanship.

(App. 453) (emphasis added). The 2011 NFHS Baseball Rules Book goes on to state: "Officials shall, while enforcing the rules of play, remain aware

of the inherent risks of injury that competition poses to student-athletes. Where appropriate, they shall inform event management of conditions or situations that appear unreasonably hazardous." (App. 530).

Prior to the game on July 7, 2011, there was a pre-game meeting between the coaches and umpires, and nobody expressed any concern about the condition of the visitor's dugout. (App. 257, 306; Tr. 470:19-472:19, 679:5-20). In fact, prior to the accident on July 7, 2011, no coach, player, umpire, or athletic director had ever raised concerns to Assumption regarding the visitor's dugout at the baseball field. (App. 214, 256, 269-70, 325-26; Tr. 289:18-23, 467:15-468:18, 532:23-535:7, 536:5-12, 768:24-769:2). In particular, Muscatine's head coach, Coach Leech, admitted he never expressed any concerns about the dugout at Assumption's baseball field prior to July 7, 2011. (App. 302; Tr. 664:14-17). Coach Leech had coached games at that field for twenty-two years prior to July 7, 2011. (App. 305; Tr. 676:14-17).

In May 2012, after the incident and nearly a year of recovery, Ludman was interviewed by a newspaper reporter for the Muscatine Journal. (App. 276-77, 549-52; Tr. 599:17-602:4). An article about the incident and Ludman's recovery was published in the Muscatine Journal on May 13, 2012. (App. 549-52). The article stated Ludman "has returned to a normal

lifestyle." (App. 549). The article relevantly quoted Ludman concerning the accident as follows:

> "It was a freak accident, nothing anybody could have done to prevent it. If I was in that spot 100 times again, it probably wouldn't happen again." … "A lot of people think I should be mad with Brooks, but it was a complete accident," Ludman stated. "There is no way, even if he tried to hit me in the head with a baseball, he could do it. It just happened."

(App. 552). Ludman further admitted having a baseball curve into the dugout at the Assumption baseball field was an unusual occurrence that was not likely to happen again. (App. 290; Tr. 613:9-16). Ludman continues to play baseball despite the risk of being hit in the head with a baseball because of his love for playing the game. (App. 294; Tr. 631:7-633:5).

At trial, Ludman tried to distinguish the accident and his injury as one occurring not while he was playing baseball. However, the facts were inapposite. Ludman was on the Muscatine baseball team roster at the time, he was at Assumption's field for the purpose of playing a baseball game, he was wearing his uniform, a baseball game was ongoing, Ludman had already batted and played in the field in the baseball game, and Ludman had gathered his hat and glove and settled himself in the opening of the dugout with a foot on the top step to exit the dugout just prior to the accident in anticipation of retaking the field for the next half-inning. (App. 290-91; Tr. 614:13-618:3). Plainly, Ludman was injured as a result of a play that

occurred in the baseball game in which he was participating. (App. 294-95; Tr. 632:11-633:5).

Prior to the accident, Ludman knew where the dugout at the Assumption field was located relative to home plate, he could see the distance from home plate to the dugout, and he knew the openings of the dugout were unprotected. (App. 291-92; Tr. 620:20-621:5). Ludman's coaches similarly recognized the configuration of the field and the closeness of the dugout to the field of play prior to the accident. (App. 213-14; Tr. 287:9-289:17). At the time of the accident Ludman was aware the baseball game was ongoing. (App. 292; Tr. 621:6-7).

Ludman's injury was the first known injury that resulted from a foul ball entering a dugout at Assumption. (App. 257; 342; Tr. 469:11-470:17; 857:8-858:5). Subsequent to the accident involving Ludman, no one has contacted Assumption president Andy Craig to express concerns about the dugouts at Assumption. (App. 343; Tr. 861:1-5). Notably, Muscatine High School has played games at Assumption subsequent to Ludman's injury and has not raised any concerns about the layout of the field or dugout. (App. 259, 270, 327, 343; Tr. 477:19-25, 536:5-12, 774:6-775:11, 861:9-16). Subsequent to the incident involving Ludman, there have been no changes to the visitor's dugout at Assumption because, as Coach Argo testified: "We

felt then and feel now … that we were providing a protection for the team and a place for the team and a place for them to get in and out. I guess we feel that we have an adequate facility to protect the visitors, the visiting team." (App. 258-59; Tr. 476:19-477:2).

ARGUMENT

I. THE DISTRICT COURT ERRED IN FAILING TO GRANT DIRECTED VERDICT IN FAVOR OF ASSUMPTION ON THE DUTY ELEMENT OF LUDMAN'S NEGLIGENCE CLAIM.

A. Preservation of Error

Assumption preserved error by making a Motion for Directed Verdict at the close of Plaintiff's evidence and renewing its Motion at the close of all evidence. (App. 333-34, 345; Tr. 822:12-827:20, 885:18-23). Assumption specifically argued Ludman did not have sufficient evidence to satisfy the duty element of his negligence claim. (App. 333-36; Tr. 822:12-833:5). Assumption argued the claim was barred because there was no duty owed to Ludman based upon the doctrine of primary assumption of the risk, as set out in *Dudley v. William Penn College*, 219 N.W.2d 484 (Iowa 1974), and Assumption did not breach any limited duty that was owed. Assumption further noted the risk in this case was open and obvious and was, in fact, known to Ludman, as he admitted getting hit by a baseball was a known risk

of playing baseball and he had previously been warned to be aware of this hazard when playing at the Assumption baseball field. (App. 333-36; Tr. 822:12-833:5). In addition, Assumption incorporated by reference all arguments made in the two Motions for Summary Judgment it had previously filed and argued in the case, which included lengthy arguments about the inherent, open, and obvious risks known to Ludman prior to the subject accident and the limited duty owed by Assumption. (App. 336; Tr. 833:1-833:5).

B. Standard and Scope of Review

Iowa appellate courts review a district court's ruling on a motion for directed verdict for correction of errors at law. *Pavone v. Kirke*, 801 N.W.2d 477, 486-87 (Iowa 2011). Directed verdict is required when there is "no substantial evidence to support the elements of the plaintiff's claim." *Id.*

C. Discussion

1. **The Limited Duty Rule Applies to this Case and, Pursuant to the Limited Duty Rule, Assumption is Entitled to Judgment as a Matter of Law because Assumption did not Owe a Duty to Protect Ludman from the Inherent Risks of the Sport and Assumption did not Breach any Limited Duty Owed to Ludman.**

"The question of the proper scope of legal duty is **a question of law to be determined by the court**." *Sweeney v. City of Bettendorf*, 762 N.W.2d 873, 880 (Iowa 2009) (emphasis added). This is true even after

Thompson v. Kaczinski, where the supreme court noted the law remained: "Whether a duty arises out of a given relationship is a matter of law for the court's determination." 774 N.W.2d 829, 834 (Iowa 2009).

The Iowa Supreme Court has long adopted and has held fast to the doctrine of inherent risk or limited duty—sometimes referred to as "primary assumption of the risk." In *Arnold v. City of Cedar Rapids*, 443 N.W.2d 332, 333 (Iowa 1989) the Iowa Supreme Court stated the label "primary assumption of the risk [is] an inaccurate term." Later, in the case of *Sweeney*, 762 N.W.2d at 881-82, the Iowa Supreme Court characterized the theory as being one of "inherent risk or a limited duty" and appeared to settle on the term "limited duty rule" as the proper nomenclature—Assumption will hereafter similarly refer to the doctrine as the "limited duty rule."

The limited duty rule has been applied and described in a number of Iowa cases, and perhaps the best summary is the following:

> [The limited duty rule] is an alternative expression for the proposition that defendant was not negligent, *i.e.*, either owed no duty or did not breach the duty owed. It is based on the concept that **a plaintiff may not complain of risks that inhere in a situation despite proper discharge of duty by the defendant**.

Nichols v. Westfield Indus., Ltd., 380 N.W.2d 392, 399 (Iowa 1985). The limited duty rule has been similarly summarized as follows: "It means the

duty of care does not extend to natural risks of the activity, or there is no breach of care when the injury results from a risk inherent to the activity." *Anderson v. Webster City Cmty. Sch. Dist.*, 620 N.W.2d 263, 267 (Iowa 2000). When the limited duty rule applies in the context of sports, the only duty of a defendant—such as Assumption—is to not expose the plaintiff to unreasonable risk of harm in light of the inherent risks of the sport. *Sweeney*, 762 N.W.2d 881; *see also Dudley*, 219 N.W.2d at 486 ("What the law regards as unreasonable risk of harm to players is somewhat unique in athletic contests, since risks naturally attend such events). The "unreasonable risk of harm" criteria in limited duty rule cases was further explained by the Iowa Supreme Court in *Feld v. Borkowski*, 790 N.W.2d 72, 87 (Iowa 2010), where the court held a defendant "acts in an unreasonable manner only when the participant **increases or creates a risk outside the range of risks that flow from participation in the sport**." (Emphasis added). Thus, where a plaintiff voluntarily and willingly participates in a sport that includes inherent risks: (1) there is no duty of care owed to protect the plaintiff from such an inherent risk, and (2) there is no breach of the duty of care in the event plaintiff suffers an injury due to an inherent risk of the activity unless the defendant directly increased or created a risk beyond the inherent risks that normally flow from the sport.

The limited duty rule has frequently been applied in cases involving spectators at sporting events—such as baseball games. For example, in *Arnold* the Iowa Supreme Court "adopted a version of the limited duty rule in a premises liability case with respect to misthrown balls." *Sweeney*, 762 N.W.2d at 882. Other jurisdictions also routinely apply this rule to cases involving injuries at baseball fields. For example, the Ohio Court of Appeals has detailed the rule as follows:

> Primary assumption of risk [a/k/a limited duty rule] is a defense generally applied in cases in which there is a lack of duty owed by the defendant to the plaintiff, and **it is a complete bar to recovery**. In that form, while there is a knowledge of the danger and acquiescence in it on the part of the plaintiff, there is also no duty owed by defendant to the plaintiff. This type of assumption of risk is typified by the baseball cases in which a plaintiff is injured when a baseball is hit into the stands.

Harting v. Dayton Dragons Prof'l Baseball Club, L.L.C., 870 N.E.2d 766, 768 (Ohio Ct. App. 2007) (internal citations and quotation marks omitted) (emphasis added).

The limited duty is even more clearly applicable in the present case because Ludman was not merely a spectator, but was an actual player in the baseball game during which he was injured. As the Iowa Supreme Court has clearly stated: "[P]layers in athletic events accept the hazards which normally attend the sport." *Dudley*, 219 N.W.2d at 486; *see also Leonard ex rel. Meyer v. Behrens*, 601 N.W.2d 76, 79 (Iowa 1999) ("[A] participant in

an athletic event assumes certain risks normally associated with the activity."). Other jurisdictions have elaborated on this concept, for example, in New York an appellate division court recently stated:

> Primary assumption of the risk [a/k/a limited duty rule] applies when a consenting participant in a qualified activity is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks. If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty. [A]wareness of risk is not to be determined in a vacuum. It is, rather, to be assessed against the background of the skill and experience of the particular plaintiff. The primary assumption of the risk doctrine also encompasses risks involving less than optimal conditions. **It is not necessary to the application of assumption of [the] risk that the injured plaintiff have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury result**.

Bouck v. Skaneateles Aerodrome, LLC, 10 N.Y.S.3d 783, 785 (N.Y. App. Div. 2015) (internal citations and quotation marks omitted) (emphasis added).

The *Dudley* case is the closest analog to the present case and, ultimately, is controlling precedent that compels entry of directed verdict/judgment as a matter of law in favor of Assumption. In *Dudley*, the plaintiff was a student at William Penn College and a player on the college baseball team. *Dudley*, 219 N.W.2d at 484. During the course of a game hosted at William Penn's baseball field, the plaintiff was sitting on his

team's bench, which was approximately 60 feet from home plate and 36 feet from the third-base line. *Id.* at 485. The baseball field did not have fencing in front of the bench. *Id.* The plaintiff was apparently not watching the batter when he hit a foul ball that lined towards the third-base bench and the ball hit the plaintiff in the eye. *Id.* The plaintiff sued the college and the baseball coach on a negligence theory. *Id.* The district court granted directed verdict in favor of the defendants—**ruling as a matter of law there was no duty owed to the plaintiff under these circumstances**. *Id.* at 485-86. The plaintiff "claimed that the college should have had dugouts or netting protecting the participants from the playing field." *Sweeney*, 762 N.W.2d 881 (summarizing *Dudley*, 219 N.W.2d 485).

On appeal, the Iowa Supreme Court affirmed the trial court's ruling in *Dudley*. *Dudley*, 219 N.W.2d 485. The court "rejected [plaintiff's] claim, noting that the duty that was owed extended only to those risks that were unreasonable." *Sweeney*, 762 N.W.2d 881 (citing *Dudley*, 219 N.W.2d at 485-86). "What the law regards as unreasonable risk of harm to players is somewhat unique in athletic contests, since **risks naturally attend such events**. Hence the cases involving successful plaintiffs are not plentiful." *Dudley*, 219 N.W.2d at 486 (emphasis added). The *Dudley* court observed: "We are not dealing here with spectator. … We are dealing with a member

of the team, located on a bench 36 feet from the third base line and 60 feet from the batter." *Id.* The *Dudley* court summarized that "[t]he principal claim is that [the college] should have protected the players by a fence, a screened dugout, a greater distance, or some other method." *Dudley*, 219 N.W.2d at 486. In the end, the court held there was no evidence the college (the premises owner) acted unreasonably as the risk of a foul ball was a natural risk of playing baseball, it was this known risk that was the actual cause of the plaintiff's injury, and there was no evidence to suggest the college did anything to increase the risk. *Id.*

Beyond *Dudley*, there is no other Iowa case involving participants in a baseball game bringing claims after being hit by a foul ball. Outside of Iowa, there are also very few examples of such claims—likely because such claims are generally recognized as lacking merit. Of the cases located, all cases involving somewhat analogous facts held the premises owner could not be liable because the injury was due to an inherent risk of the sport in which the plaintiff was participating.

Of the cases from other jurisdictions, the case *Reyes v. City of New York*, 858 N.Y.S.2d 760 (N.Y. App. Div. 2008) provides the closest analogy. In *Reyes*:

> [T]he injured plaintiff, a former minor league baseball player, was coaching a baseball team playing a game on a baseball

> field located within one of the defendant's parks. … The dugout along the third base line, which the injured plaintiff's team was using, was actually a bench between the ballfield's fence and a 50-foot long fence running parallel to the third base line. … [T]he injured plaintiff's dugout along the third base line did not have a fence in front of the side of the bench facing home plate.
>
> During the third inning, when the injured plaintiff's team was at bat, the injured plaintiff was standing in his team's dugout. He allegedly was injured when he was struck by a foul ball that had been hit into the dugout. According to the injured plaintiff, that ball came through the "opening" or "entrance" between the fences on the side of the bench facing home plate.

Reyes, 858 N.Y.S.2d at 761. The New York appellate court held summary judgment in favor of the premises owner was properly granted by the trial court "based upon the doctrine of primary assumption of the risk." *Id.* The court observed the evidence indicated "the injured plaintiff was aware that foul balls had previously been hit into the dugout" and the plaintiff "failed to raise an issue of fact as to whether the injured plaintiff was subjected to an unassumed, concealed, or unreasonably increased risk." *Id.* As such, judgment as a matter of law in favor of the premises owner was affirmed. *Id.*

The case of *Bowser v. Hershey Baseball Ass'n*, 516 A.2d 61 (Pa. Super. Ct. 1986) provides another analogous example. In *Bowser* a coach at a player tryout event was positioned in the vicinity of the players' bench, when he turned briefly to call in additional players to bat and was struck in

the eye by a foul ball. *Bowser*, 516 A.2d at 62. The plaintiff brought a claim alleging the event sponsor was negligent and should be held liable. *Id.* The appellate court rejected this claim holding:

> When [plaintiff] agreed to participate on the field during the baseball tryouts, he voluntarily exposed himself to the risks inherent in baseball. One of the risks inherent in baseball is being hit by a batted ball. **Having voluntarily exposed himself to the risk of being hit by a batted ball, [plaintiff] cannot recover from the sponsor of the baseball event for injuries caused by this very risk**. … It is beyond cavil that those who position themselves on or near the field of play while a baseball event is in progress are charged with anticipating, as inherent to the sport of baseball, the risk of being struck by a batted ball.

Id. at 63-64 (emphasis added).

Just as the courts in *Dudley*, *Reyes*, and *Bowser* held the plaintiffs' claims must be dismissed as a matter of law, the district court in the present case should have dismissed Ludman's claim as a matter of law and now this appellate court must dismiss Ludman's claims. Since the dawn of baseball, the risk of being struck by a foul ball has been recognized as an inherent risk of the sport. As early as 1908, the Supreme Court of Michigan held:

> It is knowledge common to all that in these games hard balls are thrown and batted with great swiftness; that they are liable to be muffed or batted or thrown outside the lines of the diamond, and visitors standing in position that may be reached by such balls have voluntarily placed themselves there with knowledge of the situation, and may be held to assume the risk. They can watch the ball, and may usually avoid being struck.

Blakeley v. White Star Line, 118 N.W. 482, 483 (Mich. 1908). Similarly, in the Iowa case of *Sweeney*, 762 N.W.2d at 887 (J. Cady *dissenting*), Justice Cady noted in his dissent:

> Spectators want some limited protection from the inherent risks of attending a baseball game, but they also attend the game for the chance to catch a foul ball or a home run ball. This is a time-honored tradition, deeply imbedded into the game itself and the American culture. It is as much a part of the game as the game itself and has become an inherent but acceptable danger for spectators.

In the present case, not only was being struck by a foul ball generally an inherent risk of baseball, Ludman testified at trial that he personally knew of the risk before he was struck and he specifically was aware such a risk existed for players in the dugout at Assumption. Ludman began playing baseball at age three and, thus, had been playing baseball for fifteen years prior to the accident. (App. 289; Tr. 611:21-612:10). He began playing on his high school's baseball team the summer after eighth grade and by his junior and senior years in high school, baseball was the only high school sport Ludman played. (App. 272; Tr. 543:10-13). Ludman testified, "Baseball was my passion ever since I discovered it." (App. 272; Tr. 543:16-17). Ludman expressly testified he knew a risk of the sport of baseball was being struck by a ball. (App. 289; Tr. 612:8-22). Ludman

further testified the risk of a foul ball entering the dugout was a risk of baseball he understood. (App. 289; Tr. 612:23-24).

Not only was Ludman aware of the foul ball risk, he was aware of the configuration of the Assumption baseball field—including the positioning of the dugout and openings at each end of the dugout. (App. 291-92; Tr. 620:22-622:11). Ludman's trial testimony included the following exchange:

> Q. By the time July 7, 2011 when your accident happened, you had already played at Assumption once as an 8th grader and once your sophomore year, correct?
> A. Yes, ma'am.
>
> Q. And on July 7, 2011, you knew where the dugout was located in relation to the home plate, right?
> A. Correct.
>
> Q. And you could see the distance, right?
> A. Yes, ma'am.
>
> Q. And there was nothing hidden about the location to home plate, was there?
> A. Correct.
>
> Q. And you knew that the doorways of the dugout were open and unprotected?
> A. Yes, ma'am.
>
> Q. And you were in the doorway when you were hit with ball, weren't you?
> A. What do you mean by doorway?
>
> Q. The entrance to take the field.
> A. Yes. My body -- if you looked in the doorway, you would see my body.

(App. 291-92; Tr. 620:16-621:13).

The incident of Ludman being struck by a foul ball occurred during the course of the game in which Ludman was a willing participant. (App. 294-95; Tr. 632:11-633:5). At the time of the accident Ludman was a player on the Muscatine roster, he was in uniform, he was in the lineup and a participant in the particular game, the foul ball that struck Ludman occurred during the course of normal play of the game, and at the time Ludman was struck with the foul ball Ludman had gathered his hat and glove in anticipation of taking the field after the batter made the third out. (App. 294-95; Tr. 632:11-633:5).

Prior to the accident involving Ludman, no one had ever complained or otherwise put Assumption on notice that the condition of the dugout was dangerous in any way. (App. 214, 256, 269-70, 325-26; Tr. 289:18-23, 467:15-468:18, 532:23-535:7, 536:5-12, 768:24-769:2).

Pursuant to the limited duty rule, as applied in *Dudley* and numerous other cases, Assumption is entitled to entry of judgment in its favor as a matter of law. Foul balls, including foul balls entering a dugout, are an inherent risk of baseball. At the time of the accident Ludman was not a mere spectator, but was a participant in the baseball game being played. Assumption provided an ordinary baseball field for the playing of the game,

which included a visitor's dugout that had 25.5 feet of protective fencing and a bench behind the fence that included two tiers upon which players could sit and watch the game protected from direct impact by foul balls. Rather than utilize the screened areas of the dugout, Ludman voluntarily chose to stand in the opening of the dugout where the inherent risk of being hit by a foul ball was greatly increased. Ludman's knowledge of the risk and acquiescence of the risk is a complete bar to recovery in the present case, as a matter of law. *See Dudley*, 219 N.W.2d 484 ("[P]layers in athletic events accept the hazards which normally attend the sport."); *Leonard*, 601 N.W.2d at 79 ("[A] participant in an athletic event assumes certain risks normally associated with the activity."); *see also Harting*, 870 N.E.2d at 768 (holding knowledge of risk and acquiescence are complete bar to recovery).

There was no evidence elicited at trial to suggest Assumption somehow acted unreasonably or enhanced the risk of harm in a manner to bring upon liability. A defendant "acts in an unreasonable manner only when the [the defendant] increases or creates a risk outside the range of risks that flow from participation in the sport." *Feld*, 790 N.W.2d at 87. Clearly, Assumption did nothing to promote the risk of foul balls. Moreover, the positioning of the dugout at Assumption was apparent to anyone, including Ludman, and was, in fact, substantively similar to the positioning of the

dugout in *Dudley*, 219 N.W.2d 484. In both *Dudley* and in the present case, the dugout was approximately 30 feet from the foul line and the position at which the foul ball struck the player was approximately 60 feet from home plate. *Compare Dudley*, 219 N.W.2d at 485, *with* Tr. 300:7-13, Tr. 383:17-385:12, Exhibit A, Exhibits 34, 45-50. However, in contrast to *Dudley*, the Assumption dugout provided far more safety to the players because it had 25.5 feet of fencing in front of the dugout bench that included two tiers upon which players to could sit, whereas the baseball field in *Dudley* had no protective screening for players on the bench. In sum, the risk of being hit by a foul ball was an inherent risk of the sport in which Ludman was participating and, unfortunately, that risk came to pass; however, pursuant to the limited duty rule there is no basis to impose liability on Assumption and Assumption is entitled to judgment in its favor as a matter of law.

2. <u>The Risk of being Hit by a Foul Ball was Open, Obvious, and Known to Ludman; Therefore, Assumption did not Owe a Legal Duty of Care to Protect Ludman from the Risk in the Present Case</u>.

In addition to the limited duty rule, Restatement (Second) of Torts section 343A also compels judgment in favor of Assumption as a matter of law. Restatement (Second) of Torts section 343A relevantly provides as follows:

> A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land **whose danger is known or obvious to them**, unless the possessor should anticipate the harm despite such knowledge or obviousness.

Restatement (Second) of Torts § 343A (1965) (emphasis added). Comment *e* to Restatement (Second) of Tort section 343A elaborates on this principle:

> In the ordinary case, an invitee who enters land is entitled to nothing more than knowledge of the conditions and dangers he will encounter if he comes. If he knows the actual conditions, and the activities carried on, and the dangers involved in either, he is free to make an intelligent choice as to whether the advantage to be gained is sufficient to justify him in incurring the risk by entering or remaining on the land. The possessor of the land may reasonably assume that he will protect himself by the exercise of ordinary care, or that he will voluntarily assume the risk of harm if he does not succeed in doing so. Reasonable care on the part of the possessor therefore does not ordinarily require precautions, or even warning, against dangers which are known to the visitor, or so obvious to him that he may be expected to discover them.

Restatement (Second) of Torts § 343A, *cmt. e*. This section of the Restatement, including comment *e*, has been adopted and repeatedly applied by the Iowa Supreme Court and Iowa Court of Appeals to uphold entry of judgment as a matter of law in favor of premises/property owners. *See, e.g.*, *Schmitz v. City Of Dubuque*, 713 N.W.2d 247 (Iowa Ct. App. 2006) (affirming summary judgment in favor of property owner based upon application of Restatement (Second) of Torts § 343A); *Chevraux v. Nahas*, 150 N.W.2d 78, 83 (Iowa 1967) (reversing judgment in favor of plaintiff and

remanding for entry of judgment for defendants notwithstanding the verdict based upon application of Restatement (Second) of Torts § 343A).

The case of *Schnoor v. Deitchler*, 482 N.W.2d 913 (Iowa 1992) provides perhaps the best comparison to the present case. In *Schnoor* the plaintiff was injured when his leg became entangled in a grain auger, which was open on the loading end and had no safety screen, while he was working as a truck operator hauling grain on the defendant's property. The factual record revealed the plaintiff "was familiar with [defendant's] auger and knew the loading end of the auger was open and had no safety screen, [and] [h]e admitted that an open auger was dangerous." *Schnoor*, 482 N.W.2d at 917. Leading to the accident, the plaintiff walked to within three feet of the loading end of the auger when he slipped and fell into the open auger. *Id.* The Iowa Supreme Court began its analysis by quoting Restatement (Second) of Torts section 343A and comment *e*, thereto. *Id.* Based upon the Restatement the court held:

> [The] evidence shows that [the plaintiff] knew of the auger's condition and its dangers. We conclude that when [the plaintiff] voluntarily walked in the vicinity of the open auger, he assumed the risk of harm. Under these circumstances, [the defendant/property owner] owed no duty of care to [the plaintiff].

Id. Thus, the Iowa Supreme Court reversed the jury verdict and judgment and held the district court erred in failing to direct verdict in favor of the defendant. *Id.* at 918.

In other jurisdictions Restatement (Second) of Torts section 343A has been used to directly guide the analysis of the duty element in cases involving injuries suffered due to foul balls at baseball games, and those courts have held there is no duty on the part of the property owner as a matter of law based on the legal principles enunciated therein. *See, e.g.*, *Gunther v. Charlotte Baseball, Inc.*, 854 F. Supp. 424 (D.S.C. 1994) (holding foul ball risk was open and obvious and the plaintiff voluntarily assumed risk by attending baseball game and there was no duty pursuant to Restatement (Second) of Torts section 343A); *Bellezzo v. State*, 851 P.2d 847, 851 (Ariz. Ct. App. 1992) (quoting Restatement (Second) of Torts section 343A and holding "danger of being struck by a foul ball was open and obvious" and defendant owed no duty to injured person because, "[a] contrary conclusion would expose [defendant] to liability for injuries sustained by those spectators who choose to sit in unscreened areas, despite the open and obvious risk of sitting in such areas and the availability of a protected alternative.")

Ultimately, the present case is substantively very similar to the *Schnoor* case and requires the same result. *Schnoor*, 482 N.W.2d at 917. In the present case, as has already been addressed at length, Ludman admitted he knew of the danger of foul balls and that there was no protective screening in the dugout opening in which he chose to stand. Ludman voluntarily placed himself in this position, with full awareness and knowledge of the open and obvious risks, and therefore he assumed the risk of harm. Under these circumstances, just as in *Schnoor*, Assumption owed no duty of care to protect Ludman from this risk. Thus, just an in *Schnoor*, this appellate court must reverse the jury verdict and enter judgment in favor of Assumption as a matter of law.

II. LUDMAN FAILED TO PRESENT SUFFICIENT EVIDENCE TO GIVE RISE TO A JURY QUESTION; THEREFORE, ASSUMPTION IS ENTITLED TO JUDGMENT IN ITS FAVOR AS A MATTER OF LAW.

A. Preservation of Error

Assumption preserved error by making a Motion for Directed Verdict at the close of Plaintiff's evidence and renewing its Motion at the close of all evidence. (App. 333-34, 345; Tr. 822:12-827:20, 885:18-23) Assumption specifically argued Ludman did not have sufficient evidence to satisfy the elements of his negligence claim. (App. 333-36; Tr. 822:12-833:5).

B. Scope and Standard of Review

Iowa appellate courts review a district court's ruling on a motion for directed verdict for correction of errors at law. *Pavone*, 801 N.W.2d at 486-87. Directed verdict is required when there is "no substantial evidence to support the elements of the plaintiff's claim." *Id.* "Each element of the plaintiff's claim must be supported by substantial evidence to warrant submission to the jury." *Van Sickle Const. Co. v. Wachovia Commercial Mortgage, Inc.*, 783 N.W.2d 684, 687 (Iowa 2010).

C. Discussion

Even if the limited duty rule and Ludman's assumption of the risk are not held to mandate judgment as a matter of law in favor of Assumption, Assumption should still be granted judgment in its favor based upon the insufficiency of the evidence to generate a jury question under the general negligence standard applicable in this premises liability case. In the present case, the jury was instructed consistent with the general premises liability model jury instruction found at Iowa Civil Jury Instruction No. 900.1. (App. 594). Pursuant to this jury instruction, which sets out the essential elements the plaintiff must prove in order to recover, Ludman was relevantly required to prove:

> 1. That Assumption knew, or in the exercise of reasonable care should have known that the location and

> condition of the visitor's dugout at the Assumption ball field involved an unreasonable risk of injury to a person such as Spencer Ludman as a visiting ball player.
>
> 2. Assumption knew or in the exercise of reasonable care should have known:
>
> (a). That the plaintiff would not discover the condition, or
>
> (b). The plaintiff would not realize the condition presented an unreasonable risk of injury, or
>
> (c). The plaintiff would not protect himself from the condition.

(App. 594).

At trial, the overwhelming evidence was inapposite to these essential elements of Ludman's claim. First and foremost, there was no "unreasonable risk of injury" to Ludman because Assumption provided the visiting team with sufficient fencing in front of the dugout, behind which all baseball players for Muscatine High School could have safely protected themselves. The evidence at trial was that Muscatine had fifteen players and four coaches on its baseball team. (App. 215; Tr. 293:3-10). Thus, there were a total of nineteen people that could have been in the dugout at one time. At the time Ludman was injured, one Muscatine player was at-bat and one player was on deck. (App. 214-15; Tr. 292:16-293:2). Additionally, one coach was on the field as the third base coach and another was on the field as the first base coach. (App. 215; Tr. 293:22-294:6). Thus, at most,

there were fifteen people in the Muscatine dugout at the time of Ludman's accident.

On July 7, 2011, the visitor's dugout at Assumption's baseball field included a protective fence in front of the majority of the dugout that was 25.5 feet long and extended from the ground to the ceiling of the dugout. (App. 237-38, 403-35; Tr. 384:18-385:12). The visitor's dugout was seven feet wide/deep and was two steps below grade. (App. 237, 403-35; Tr. 383:11-16). There was a bench along the back wall of visitor's dugout that had two levels upon which the players could sit, and an assistant coach for Muscatine testified it was common for the players to sit on both the upper and lower levels. (App. 229, 233, 403-35; Tr. 351:23-352:13, 368:9-17). Ludman failed to put on evidence there was no room to sit on the bench (on either of the two levels of the bench) just prior to the incident or that he could not have stood in front of the bench and behind the protective fence—at seven feet deep there was clearly room for players to stand two-deep in the dugout if necessary. Plainly, there was more than enough room in the visitor's dugout for Ludman to have taken a position in a protected location prior to being struck. Because the visitor's dugout included sufficient protective fencing, Assumption had no basis to know or suspect the visitor's dugout involved an unreasonable risk of injury. In addition, Ludman's own

coach testified that he instituted no rule against players standing in the second opening of the dugout (further away from home plate, where Ludman was standing) because it was not likely that a ball would strike a player there. (App. 306; Tr. 678:18-679:4). In sum, there was insufficient evidence to submit the case to the jury concerning the unreasonable risk element and this court should reverse the ruling denying Assumption's Motion for Directed Verdict.

Moreover, there was insufficient evidence at trial to generate a jury question as to whether Assumption should have known (1) Ludman would not discover the condition of the dugout, (2) Ludman would not realize the condition of the dugout presented a risk of injury, or (3) Ludman would not protect himself from the condition. Ludman's own testimony completely undermines his ability to support this element. Ludman testified the condition of the dugout, including the openings and the closeness of the dugout to home plate was open, obvious, and ***actually known*** to him. (App. 274, 291-92; Tr. 551:19-23; 620:12-622:11). Ludman testified he was well aware of the risks posed by foul balls. (App. 289; Tr. 612:8-22). Other witnesses at trial affirmed the risk posed by foul balls is well known to all who play baseball. (App. 233, 243, 255-56, 262, 306; Tr. 365:11-21, 406:2-408:3, 463:7-465:7, 491:16-18, Tr. 678:3-11). The risk was, of course,

especially apparent to an eighteen-year-old high school senior on the varsity baseball team that had been playing baseball for fifteen years prior to this accident.

A couple cases provide a helpful comparison to the present case and further demonstrate there was insufficient evidence to generate a jury question in the present case. In *Harper v. Pella Corp.*, No. 06-1198, 2007 WL 2004509 (Iowa Ct. App. July 12, 2007) the plaintiff alleged the defendant was liable on a premises liability theory after he slipped on stairs and suffered injury. The district court granted summary judgment in favor the defendant and the court of appeals affirmed. The court held "the evidence shows the condition of the stairs and the possibility of slipping on them while in stocking feet was known and obvious to [the plaintiff]." *Harper*, 2007 WL 2004509 at *2. The evidence showed the stairs were shiny, giving the plaintiff notice to be careful, and the plaintiff failed to use the safety railing while descending the stairs. *Id.* Based on this evidence, the court held there was no jury question and judgment was properly entered in favor of the defendant as a matter of law. The present case is substantively the same. Here, Ludman knew the dugout had openings, that home plate was close to the dugout, and there was a potential for dangerous foul balls. Further, like the safety railing in *Harper*, Assumption provided a

safety feature in the form of protective fencing behind which Ludman could have stood but chose not to. Under these facts, just as in *Harper*, there was no jury question and judgment as a matter of law should be entered in favor of Assumption.

The case of *Pfenning v. Lineman*, 947 N.E.2d 392 (Ind. 2011) provides an even more closely analogous case. In *Pfenning*, the plaintiff was struck by a golf ball while participating in a golf outing while driving a beverage cart on the cart path. *Pfenning*, 947 N.E.2d at 397. Among other defendants, the plaintiff sued the owner of the golf course. *Id.* Indiana law includes elements of premises liability substantially similar to those adopted in Iowa, providing:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

Id. at 406. The Indiana Supreme Court cogently analyzed the evidence and law reached the following conclusion:

> We find no genuine issue of fact to contravene the objectively reasonable expectation by the [premises owner] that persons present on its golf course would realize the risk of being struck by an errant golf ball and take appropriate precautions. …
>
> The **determination of duty is one of law for the court**, and we hold that **the risk of a person on a golf course being struck by a golf ball does not qualify as the "unreasonable risk of harm"** referred to in the first two components of the … three-factor test. …
>
> We find that the undisputed designated evidence conclusively establishes that crucial aspects of two of the elements of premises liability are not satisfied. There is no showing that (a) the Elks should have reasonably expected that its invitees would fail to discover or realize the danger of wayward golf drives, and (b) the risk of being struck by an errant golf ball involved an unreasonable risk of harm.

Id. at 406-07 (emphasis added). Similar facts to *Pfenning* exist here, and in the present case the facts are even more favorable to the defendant. The risk of foul balls was manifest and it was even admitted by Ludman that he knew of and understood the risk. Appropriate precautions to protect against injury were available to Ludman, but were not utilized by Ludman's own choice. Just as the Indiana Supreme Court granted judgment as a matter of law in favor of the premises owner in *Pfenning*, this Court should hold Assumption is entitled to judgment in its favor.

III. THE DISTRICT COURT ERRED IN PRECLUDING ASSUMPTION FROM PRESENTING EVIDENCE OF OTHER BASEBALL FIELDS, AND ASSUMPTION WAS HIGHLY PREJUDICED BY EXCLUSION OF THIS EVIDENCE.

A. Preservation of Error

Error was preserved first through Plaintiff's Motion in Limine No. 6, which sought to preclude Assumption from presenting evidence comparing the dugouts from the other schools in Assumption's athletic conference to Assumption's visitor's dugout. (App. 130). This Motion in Limine was argued to the district court on June 5, 2015. (App. 177-78). The district court issued a ruling on Motion in Limine No. 6, which barred Assumption from presenting evidence of custom and standard practice regarding design and construction of dugouts at the other schools. (App. 191-92). At trial, Assumption renewed its request to present evidence regarding the customary manner of dugout design and construction at other high schools. (App. 218-19; Tr. 309:18-310:2). Assumption made offers of proof establishing the anticipated substance of its evidence concerning customary design and construction of dugouts at other schools within Assumption's athletic conference. (App. 219-21; 439-52; Tr. 312:2-317:21,733:8-741:5). At trial the district court affirmed its ruling and barred Assumption from presenting

evidence regarding the design and construction of other dugouts. (App. 222; 318-19; Tr. 323:4-14, 740:25-741:5).

B. Scope and Standard of Review

Appellate courts review evidentiary rulings made by the trial court for abuse of discretion. *Heinz v. Heinz*, 653 N.W.2d 334, 338 (Iowa 2002). An abuse of discretion exists when the court exercises its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Id.* The court abuses its discretion if it rejects relevant evidence based on an erroneous application of the law. *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000). Reversal is required if the trial court's erroneous ruling results in prejudice to the complaining party. *Horak v. Argosy Gaming Co.*, 648 N.W.2d 137, 149 (Iowa 2002).

C. Discussion

The district court committed a clear and prodigiously prejudicial error in barring Assumption from presenting evidence concerning custom and standard practice in the design and construction of dugouts at baseball fields at other schools within Assumption's athletic conference, the Mississippi Athletic Conference.

Pursuant to Iowa law it is well established that: "[E]vidence of what is usual and customary is generally admissible on the issue of negligence. A

custom or usage in any particular trade or business may be shown, as a fact, by a witness who is qualified by knowledge and experience to testify to its existence." *Englund v. Younker Bros.*, 142 N.W.2d 530, 534 (Iowa 1966). This rule is recognized across virtually all, if not all, jurisdictions. Restatement (Second) of Torts section 295A (1965), which was approvingly cited by the Iowa Supreme Court in *Chown v. USM Corp.*, 297 N.W.2d 218, 222 (Iowa 1980), summarizes the rule as follows: "In determining whether conduct is negligent, the customs of the community, or of others under like circumstances, are factors to be taken into account." Comment *b* to Restatement (Second) of Torts section 295A provides further relevant explanation and remarks on the issue of admissibility:

> *b. Relevance of custom.* Any such custom of the community in general, or of other persons under like circumstances, is always a factor to be taken into account in determining whether the actor has been negligent. **Evidence of the custom is admissible, and is relevant**, as indicating a composite judgment as to the risks of the situation and the precautions required to meet them, as well as the feasibility of such precautions, the difficulty of any change in accepted methods, the actor's opportunity to learn what is called for, and the justifiable expectation of others that he will do what is usual, as well as the justifiable expectation of the actor that others will do the same. **If the actor does what others do under like circumstances, there is at least a possible inference that he is conforming to the community standard of reasonable conduct**; and if he does not do what others do, there is a possible inference that he is not so conforming. In particular instances, where there is nothing in the situation or in common experience to lead to the contrary conclusion, this inference

> may be so strong as to call for a directed verdict, one way or the other, on the issue of negligence.

Restatement (Second) of Torts § 295A, *cmt. b* (emphasis added).

Similarly, the Restatement (Third) of Torts: Physical & Emotional Harm section 13 (2010), while not yet adopted in Iowa, provides an updated affirmation of this rule, stating:

> (a) An actor's **compliance with the custom of the community, or of others in like circumstances, is evidence that the actor's conduct is not negligent** but does not preclude a finding of negligence.
>
> (b) An actor's departure from the custom of the community, or of others in like circumstances, in a way that increases risk is evidence of the actor's negligence but does not require a finding of negligence.

Restatement (Third) of Torts: Phys. & Emot. Harm § 13 (2010) (emphasis added). Comment *b* to the Restatement (Third) provides additional insight:

> *b. Compliance with custom: rationale.* Evidence that the actor has complied with custom in adopting certain precautions may bear on whether there were further precautions available to the actor, whether these precautions were feasible, and whether the actor knew or should have known of them. **In assessing such evidence, the jury can take into account the fact that almost all others have chosen the same course of conduct as has the actor: "ordinary care" has at least some bearing on "reasonable care." Furthermore, if the actor's conduct represents the custom of those engaging in a certain line of activity, the jury should be aware of this, for it cautions the jury that its ruling on the particular actor's negligence has implications for large numbers of other parties.**

Id. at *cmt. b* (emphasis added).

Legal treatises provide further support and explanation of the reasoning for admitting evidence of custom and standard practice. One treatise relevantly states:

> The standard of care required in a particular negligence case may be based on custom and practice in the relevant community. Customary conduct may be considered as furnishing a standardized gauge and as one circumstance to be weighed along with all others in determining whether or not ordinary care has been exercised. Accordingly, **in a negligence action, customs or practices may be evidence of whether conduct meets the general standard of reasonable care under the circumstances**, although customs or practices do not necessarily establish the standard of care. The Restatement position is that any such custom of the community in general, or of other persons under like circumstances, is **always a factor to be taken into account in determining whether the actor has been negligent**. If the actor does what others do under like circumstances, there is at least a possible inference that he or she is conforming to the community standard of reasonable conduct, and if the actor does not do what others do, there is a possible inference that he or she is not so conforming.

57A Am. Jur. 2d *Negligence* § 160 (emphasis added). A subsequent section of this treatise further states: "Evidence of the custom and practice of persons engaged in a trade or business similar to the trade or business of a party to a negligence suit **is admissible and probative in regard to the requisite standard of care**." 57A Am. Jur. 2d *Negligence* § 164 (emphasis added).

Iowa case law adopting and applying this rule as to admissibility of evidence of custom and standard practice in negligence cases are legion.

See, e.g., *Trushcheff v. Abell-Howe Co.*, 239 N.W.2d 116, 125 (Iowa 1976) (holding evidence of custom and standard practice of placing wood curbings around holes in roof decks was relevant, material, and admissible); *Englund*, 142 N.W.2d at 534 (1966) (holding "evidence of what is usual and customary is generally admissible on the issue of negligence"); *Anthes v. Anthes*, 139 N.W.2d 201, 210 (1965) (holding evidence of "custom and usual or accepted practice in erecting corn crib tunneling" was admissible); *McCrady v. Sino*, 118 N.W.2d 592, 594 (Iowa 1962) (holding "evidence of what is usual and customary is generally admissible on the issue of negligence"); *Bradshaw v. Iowa Methodist Hosp.*, 101 N.W.2d 167, 173 (1960) (same); *see also Sorrels v. NCL (Bahamas) Ltd.*, 796 F.3d 1275, 1282 (11th Cir. 2015) ("Evidence of custom within a particular industry, group, or organization is admissible as bearing on the standard of care in determining negligence. Compliance or noncompliance with such custom, though not conclusive on the issue of negligence, is one of the factors the trier of fact may consider in applying the standard of care.").

The importance of evidence of custom is driven home by the *Dudley* case, which has been summarized at length *supra*. 219 N.W.2d at 486-87. In *Dudley*, the plaintiff put on evidence of dugout design and construction at various baseball fields in the defendant-college's athletic conference. *Id.*

And, in large part, the defendant was granted directed verdict, which was affirmed on appeal, because the evidence of other dugouts showed the defendant-college's dugout was generally in conformity with dugouts at other colleges in the athletic conference. *Id.* Thus, it is obvious similar evidence in the present case was both admissible and highly probative.

In erroneously failing to follow the clear and governing legal rule that evidence of custom and standard practice is admissible in cases involving alleged negligence the district court made a woefully misplaced analogy. The district court stated that allowing evidence of custom and standard practice "would be similar to allowing a motorist to argue that because they were in a line of cars that were all exceeding the speed limit that they did not violate the speeding law in effect for that portion of the roadway." (App. 191). This analogy is plainly wrong because it equates violation of an objective, bright-line law with negligence. Negligence, unlike a speed limit, is dependent on the analysis of various subjective criteria used to determine whether a defendant violated the duty to exercise reasonable care—as set out in the district court's own jury instructions. (App. 593). The district court's misapprehension of the law resulted in a fatal error concerning admissibility of key evidence and, therefore, judgment must be reversed and a new trial granted.

The case of *Gibson v. Shelby County Fair Association*, 65 N.W.2d 433 (Iowa 1954) is particularly relevant here. In *Gibson*, the plaintiff was severely injured while attending an automobile race at the county fairgrounds when a wheel became detached from a vehicle and broke through a fence and struck him. *Gibson*, 65 N.W.2d at 434. The plaintiff alleged the fencing and safety mechanisms were inadequate. *Id.* at 435. At trial, the plaintiff sought to present evidence of the customary and standard practices for construction of barricades at races; however, the district court precluded such evidence on the defendant's objection. *Id*. The supreme court held the trial court was in error. The court held "the rule is well settled that evidence of custom or common usage of a business or occupation is generally admissible on the question of negligence." *Id.* at 435-36. The court went on to note:

> [T]he rule is that upon the issue of negligence …, evidence of the ordinary practice or of the uniform custom, if any, of persons in the performance under similar circumstances of acts like those which are alleged to have been done negligently is generally competent evidence. **Evidence of custom is admissible to prove negligence as well as to disprove it**."

Id. at 437 (emphasis added). Ultimately, in *Gibson*, the supreme court held the trial court's refusal to admit competent evidence concerning custom and standard practice was in error and the case was reversed and remanded for a new trial. *Id*. at 438.

The present case bears strong resemblance to *Gibson* and, likewise, requires reversal and remand for a new trial. At trial, Ludman's theory of the case focused on the suggestion that Assumption should have installed gates in the dugout openings or should have built an L-shaped fence around the openings. (App. 206, 209, 211, 215, 352-55; Tr. 260:3-25, 270:10-21, 278:15-19, 294:7-21, 914:25-916:12, 917:1-7, 928:21-23). To meet this argument, Assumption sought to introduce evidence as to the custom and standard practice regarding design and construction of dugout fencing or screening at the other high schools that were also members of the Mississippi Athletic Conference. (App. 219-21, 256, 317, 439-52; Tr. 309:22-317:21, 466:23-467:14, 733:21-741:5). Assumption primarily sought to admit this evidence via the testimony of expert witness Greg Gowey, an architect with substantial experience in designing projects for schools—including designing baseball complexes—who had visited each of the baseball fields of the schools in the Mississippi Athletic Conference. (App. 319-20; Tr. 742:18-746:12). Assumption also compiled an exhibit with photographs of the baseball field dugouts at all of the schools of the Mississippi Athletic Conference that it was prepared to offer into evidence at trial. (App. 317-19, 439-52; Tr. 733:21-741:5). The district court denied Assumption's request to admit the photographic exhibit into evidence for the

jury to consider, but the exhibit was electronically filed with the district court as "Exhibit C" and is part of the appellate record. (App. 318-19, 439-52; Tr. 740:21-741:5).

Through an offer of proof the following relevant evidence was elicited as to the design and construction of dugouts at the schools of the Mississippi Athletic Conference:

- Davenport Central High School: Like Assumption, the dugout had a protective fence in the center section of the dugout (although the fence did not extend all the way to the ceiling of the dugout as Assumption's does) and two openings directly to the field of play at the ends of the dugout. (App. 317, 439; Tr. 734:17-735:14).

- Davenport North High School: Like Assumption, the visitor's dugout had a protective fence in the center section of the dugout and two openings directly to the field of play at the ends of the dugout. (App. 317, 440-41; Tr. 735:15-736:3).

- Davenport West High School: Like Assumption, the visitor's dugout had a protective fence in the center section of the dugout and two openings directly to the field of play at the ends of the dugout. (App. 317-18, 442-43; Tr. 736:9-737:6).

- Muscatine High School: Like Assumption, the visitor's dugout had a protective screen in the center section of the dugout (although the screen is short, only reaching a rail height) and two wide openings directly to the field of play at the ends of the dugout. (App. 318, 444-46; Tr. 737:7-737:20).

- Pleasant Valley High School: Like Assumption, the visitor's dugout had a protective fence in front of the dugout, but it only had one opening directly to the field of play at the home plate end of the dugout. (App. 318, 448; Tr. 737:21-738:7).

- North Scott High School: Like Assumption, the visitor's dugout had a protective fence in the center section of the dugout and two openings directly to the field of play at the ends of the dugout. (App. 318, 449; Tr. 738:8-738:18).

- Clinton High School: Like Assumption, the visitor's dugout had a protective fence in the center section of the dugout and two openings directly to the field of play at the ends of the dugout. (App. 317, 450; Tr. 738:19-739:11).

- Burlington High School: Like Assumption, the visitor's dugout had a protective screen in the center section of the dugout (although the screen is short, only reaching a rail height) and two wide openings directly to the field of play at the ends of the dugout. (App. 318, 451; Tr. 739:12-740:4).

- Bettendorf High School: This was the only dugout that substantially differed from the rest, in that the dugout had a side entrance instead of an opening in the front of the dugout. (App. 318, 452; Tr. 740:7-740:4).

In sum, the evidence Assumption was precluded from offering at trial showed nearly every dugout at the high school baseball fields of the Mississippi Athletic Conference was substantially similar to Assumption's visitor's dugout—in that, they had a protective screen in the center section and openings at both ends. None of the dugouts in the Mississippi Athletic Conference had gates or L-shaped fences in front of the openings—the absence of which was the primary basis for Ludman's contention that Assumption was negligent. This evidence was clearly competent, relevant, and admissible. The district court's erroneous preclusion of the evidence was highly prejudicial to Assumption because the evidence constituted

highly persuasive evidence that Assumption was conforming to the community standard of reasonable conduct. *Gibson*, 65 N.W.2d at 435-36; *see also* 57A Am. Jur. 2d *Negligence* § 160.

Additionally, the district court's error in failing to admit Assumption's key evidence of custom and standard practice was compounded by Plaintiff's counsel soliciting evidence during the direct examination testimony of Muscatine assistant coach Nathan Panther that he had observed dugouts with gates and L-shaped fences in his experience. Coach Panther's testimony included the following exchanges with Plaintiff's counsel:

> Q. Mr. Panther, are you familiar with a wide variety of ball field layouts and dugouts?
> A. Yeah, you can say that. I've seen a lot of different fields throughout my playing days.

(App. 213; Tr. 285:16-19).

> Q. Have you ever seen a dugout that had an L shape or a barrier to keep balls from going in?
> A. Yeah, I have. I've see those where they'll have a gate may three or four feet out in front of the dugout that goes down so no direct balls can go in and you kind of walk around it, yeah, I've seen those.

(App. 215; Tr. 294:15-21). After Plaintiff's counsel solicited this testimony, Assumption's counsel renewed its argument for submission of evidence of custom and standard practice in the Mississippi Athletic Conference, which the district court again erroneously denied. (App. 222; Tr. 323:4-327:12).

Instead the district court decided it would simply admonish the jury not to consider coach Panther's testimony on this topic. (App. 223; Tr. 326:21-12). This was an inadequate remedy as the jury was left with hearing evidence suggesting an alternative design was commonplace through Plaintiff's counsel's examination, despite the fact it was Plaintiff who moved in limine to preclude such testimony. Assumption's evidence of custom and standard practice should have been admitted regardless of Plaintiff's violation of the order in limine; however, the prejudice in failing to admit the evidence was exacerbated by Plaintiff's counsel overstepping the order in limine and the district court barring Assumption from meeting that evidence.

In sum, as the Iowa Supreme Court has repeatedly held, "the rule is well settled that evidence of custom or common usage … is generally admissible on the question of negligence." *Gibson*, 65 N.W.2d at 435-36. There was no basis to depart from this well-settled rule here and the district court committed obvious error by precluding Assumption's competent evidence of the custom and standard practice concerning dugout design and construction in the community. Assumption was highly prejudiced by exclusion of this evidence and, therefore, judgment must be reversed and the case remanded for a new trial. *Id.* at 438.

IV. THE DISTRICT COURT ERRED IN FAILING TO GIVE JURY INSTRUCTIONS REGARDING "PROPER LOOKOUT."

A. Preservation of Error

Error was preserved by Assumption's submission of proposed jury instructions regarding "proper lookout," argument to the district court regarding "proper lookout" jury instructions, and Assumption's objection to the court's failure to give jury instructions regarding "proper lookout." (App. 345, 572).

B. Scope and Standard of Review

Refusals to give jury instructions are reviewed for correction of errors at law. *Weyerhaeuser Co. v. Thermogas Co.*, 620 N.W.2d 819, 823-24 (Iowa 2000). "The district court must give a requested jury instruction if the instruction (1) correctly states the law, (2) has application to the case, and (3) is not stated elsewhere in the instructions." *Id.* "Parties are entitled to have their legal theories submitted to the jury if they are supported by the pleadings and substantial evidence in the record." *Id.* When weighing the sufficiency of the evidence to support a requested instruction, the court weighs the evidence in the light most favorable to the party seeking the instruction. *Id*. A district court's failure to give a requested jury instruction requires reversal if it results in prejudice. *Id*.

C. Discussion

Jury instructions regarding "proper lookout" were warranted in this case as there was competent evidence at trial that Ludman voluntarily placed himself in an unprotected area of the dugout and then failed to watch as the batter swung and struck the ball that subsequently hit him.

Assumption sought to have the court include the general instruction on proper lookout, based of Iowa Civil Jury Instruction 700.12, and have the court include a specification concerning proper lookout as a part of the comparative fault jury instruction. (App. 345-49, 572). Assumption's request was in accord with Iowa law, as the Iowa Supreme Court has explained:

> The purpose of requiring the jury to consider factual specifications is to limit the determination of facts or questions arising in negligence claims to only those acts or omissions upon which the court has had an opportunity to make a preliminary determination of the sufficiency of the evidence to generate a jury question. Each specification should identify either a certain thing the allegedly negligent party did which that party should not have done, or a certain thing that party omitted that should have been done, under the legal theory of negligence that is applicable. Maintaining a proper lookout encompasses the duty to be careful of the movements of one's self in relation to things seen and that could have been discerned or seen in the exercise of care.

Coker v. Abell-Howe Co., 491 N.W.2d 143, 151 (Iowa 1992) (internal citations omitted).

The jury instruction requested by Assumption was a correct statement of the law—taken verbatim from Iowa Civil Jury Instruction 700.12. Moreover, there was sufficient evidence to support giving the proper lookout instruction, based on Ludman's own testimony, and the proper lookout instruction was not embodied in any other jury instructions. Ludman voluntarily placed himself in a precarious location by standing in the opening of the dugout—rather than behind the fence. (App. 275; Tr. 553:15-555:5). Ludman testified he knew where the dugout at the Assumption field was located relative to home plate, he could see the distance from home plate to the dugout, and he knew the dugout openings were unprotected. (App. 291-92; Tr. 620:22-622:11). Despite taking this position on the periphery of the protective fencing, Ludman testified he did not watch the ball as it was pitched to the batter and did not shift his head to look for the ball until he heard the sound of bat striking ball—which was too late. (App. 275-76; Tr. 556:13-17, 557:9-13). In this case, Ludman's actions were the very definition of failure to keep a proper lookout. Ludman failed to maintain awareness of his movements in relation to the activities around him and failed to take notice of what could have been seen after placing himself outside of the protective fence. *See* Iowa Civil Jury Instruction 700.12; *Coker*, 491 N.W.2d at 150-51.

The district court's error in failing to give this instruction was prejudicial to Assumption. As instructed, the jury was not allowed to consider that Ludman could have avoided injury by watching the batter or taking cover in the face of danger in assessing comparative fault. (App. 597). At a minimum, if the jury was allowed to take this into consideration the amount of fault assigned to Ludman would likely have been higher, and the jury reasonably could have found Ludman was more than 50% at fault—barring Ludman's recovery.

Due to the district court's error in instructing the jury, this Court must reverse the judgment and remand for a new trial, at which the jury can be properly instructed.

CONCLUSION

For the reasons stated herein, Assumption requests reversal of the district court's judgment and dismissal of Plaintiff's Petition as a matter of law or, in the alternative, requests reversal and remand for new trial based on the errors in the evidentiary rulings and jury instructions.

REQUEST FOR ORAL ARGUMENT

Assumption hereby requests to be heard in oral argument.

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This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 13,977 words, excluding the parts of the Brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point, Times New Roman.

By: _____
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CERTIFICATE OF FILING AND SERVICE

The undersigned certifies a copy of Defendant-Appellant's Final Brief was filed with the Clerk of the Iowa Supreme Court via EDMS and served upon the following persons by EDMS on the 1st day of April, 2016.

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